

## **N.D.A.G. Letter to Enget (March 24, 1998)**

March 24, 1998

Mr. Wade G. Enget  
Mountrail County State's Attorney  
PO Box 369  
Stanley, ND 58784-0369

Dear Mr. Enget:

Thank you for your February 19, 1998, letter in which you have requested information concerning the propriety of a sheriff charging a \$10 background check fee to a handgun dealer for conducting a criminal history record check of a purchaser of a handgun from that dealer.

For purposes of this discussion, I assume that your sheriff is conducting this background check pursuant to Brady Act procedures.

Congress adopted the Brady Act, now codified in 18 U.S.C. § 922(s) and (t). This act established procedures to obtain background checks of purchasers of handguns. The statutory provisions imposed specific requirements upon firearm dealers, chief law enforcement officers of a local jurisdiction, and upon purchasers of handguns.

A background check of a handgun purchaser was required which involved the chief law enforcement officer of a local jurisdiction. This local check permitted ready access to a firearms dealer of a background check until implementation of a national instant check system in November of 1998.

A firearms dealer under the act must receive from the purchaser a statement, the "Brady Form" containing the name, address, and date of birth of the proposed purchaser along with a sworn statement that the purchaser is not among any of the classes of prohibited purchasers, which includes convicted felons. The dealer must also verify the identity of the purchaser by examining an identification document and must provide the chief law enforcement officer of the purchaser's residence with notice of the content and a copy of the Brady Form.

Upon receipt of the Brady Form, the chief law enforcement officer was required to make a reasonable effort within five state office business days to do a background check to determine whether the receipt or possession by the purchaser of a handgun would be in violation of law. The chief law enforcement officer would then report to the dealer whether the purchaser could obtain the handgun. The chief law enforcement officer would also be required to destroy that officer's copy of the Brady Form and, if notification was given that the purchaser could not receive or possess a handgun,

provide written reasons to the purchaser why the purchaser could not receive or possess a handgun.

Unless a purchaser of a handgun has a written statement from the chief law enforcement officer that he or she needs a handgun because of a threat to life of the purchaser or any member of the household of the purchaser or the purchaser has a valid permit, such as a concealed weapons permit, allowing the purchaser to possess or acquire a handgun, the purchaser must wait five state office business days before the dealer may deliver a handgun to the purchaser. This time will be shortened if the chief law enforcement officer does a background check and notifies the dealer that the purchaser is a person who is not prevented from receiving or possessing a handgun.

In Printz v. United States, U.S. 1 117 S.Ct. 2365, 138 L.Ed.2d 914 (1997), the court declared certain portions of the Brady Act unconstitutional as it pertains to the mandatory and required activities of a chief law enforcement officer. In Printz, the court concluded that the federal government may not compel the states to enact or administer a federal regulatory program and the mandatory obligation imposed upon chief law enforcement officers of a jurisdiction to perform background checks on prospective handgun purchasers ran afoul of that rule. The court specifically held that the chief law enforcement officer, in your case your sheriff, did not have a duty to accept notice of the contents of, and a copy, the completed Brady Form, which the firearms dealer is required to provide to the chief law enforcement officer, or to make a background check within five business days to determine whether receipt or possession of a handgun would be violation of the law. In other words, your sheriff has no requirement imposed upon him by the Brady Act to receive a copy of a Brady Form from a firearms dealer or to conduct any background check of a handgun purchaser for the firearms dealer.

It is important to note that the court in Printz did not decide whether firearm dealers remain obliged or obligated to forward to the chief law enforcement officer the Brady Form and to wait five business days before completing the sale. The court stated that these provisions burden only firearms dealers and purchasers and neither was a plaintiff in the case before the court. The court declined to speculate regarding the rights and obligations of parties not before the court.

It does appear, then, that firearms dealers are still required under the Brady Act to require a purchaser to fill out a Brady Form and to submit it to the chief law enforcement officer even if the chief law enforcement officer is not required to accept it. A purchaser of a handgun, unless that purchaser has a written statement from the chief law enforcement officer stating that the purchaser is facing threats upon the purchaser or the purchaser's family's life or has a handgun permit, must wait five state office business days before the purchaser may obtain the handgun and before the dealer may transfer possession of that handgun to the purchaser. Absent notice from the chief law enforcement officer that the purchaser may receive and possess a handgun, the Brady Act continues to require the firearms dealer to wait the five state business days before transferring the handgun to the purchaser or until the dealer hears from the chief law enforcement officer prior to the expiration of that five day period.

If the chief law enforcement officer does not conduct the Brady background check, it is possible that purchasers of handguns will have to wait for expiration of the five state office business days before obtaining that handgun and before a firearms dealer will be permitted by the Brady Act to transfer possession of that handgun. In light of the Printz decision, it is likely that, in some cases, a purchaser of a handgun will be required to wait a longer period of time before the handgun sale can be consummated if the chief law enforcement officer will not conduct the background check to shorten this waiting period.

My examination of North Dakota state law and 18 U.S.C. § 922 failed to disclose any specific direction that a sheriff charge a fee for conducting the background check under the Brady Act. However, the county may be permitted to contract to provide a service. N.D.C.C. § 11-10-01. In addition, the Board of County Commissioners has the power to establish charges for any county or other services. N.D.C.C. § 11-11-14(4).

Since the sheriff would be providing a service which neither he nor the county would be legally obligated to provide, whether such service will be provided and under what terms it would be provided may be subject to approval of the appropriate county officials.

Sincerely,

Heidi Heitkamp  
ATTORNEY GENERAL

rpb/vkk